

REPORT
TO
THE WISCONSIN SUPREME COURT
ON
THE FUNCTION AND OPERATION OF DISTRICT
COMMITTEES
BY
THE BOARD OF ADMINISTRATIVE OVERSIGHT OF
THE LAWYER REGULATION SYSTEM

March 22, 2004

INTRODUCTION

In its September 25, 2000 Order establishing the current Lawyer Regulation System, the Wisconsin Supreme Court charged the Board of Administrative Oversight with presentation of a report to the Court on its review of the function and operation of District Committees, recommending whether or not they should be retained, and, if so, proposing Rule amendments to improve their operation.

In conducting its review, the Board concentrated on four areas:

1. Structure of the District Committee System and individual District Committees
2. Role of District Committees
3. Operating Procedures of District Committees
4. Training members of District Committees

In addition, the Board considered ways to measure public trust and confidence in District Committees.

The Board appointed a Subcommittee chaired by Circuit Court Commissioner Dennis R. Cimpl and consisting of Attorney Burnetta L. Bridge (until September, 2003), Attorney Scott Roberts and Claire A. Fowler to conduct the review. The Subcommittee reviewed the October, 1999 Report on the Wisconsin Lawyer Regulation System of the Standing Committee on Professional Discipline of the American Bar Association, the Manual for District Committees of the Office of Lawyer Regulation and a 1998 Survey of District Chairpersons by the BAPR Study Committee of the State Bar of Wisconsin. It visited every District Committee, following up the meetings with telephone surveys of each Chairperson. It met with District Chairpersons on numerous occasions. It solicited feedback from Committee members, investigative staff of the Office of Lawyer Regulation, members of the Preliminary Review Committee and the State Bar of Wisconsin OLR Study Committee. It studied questionnaire responses from grievants and respondents who had been involved with District Committees. It attended District Committee training sessions.

I

SHOULD DISTRICT COMMITTEES BE RETAINED?

The Board unanimously recommends retention of District Committees. They serve a unique role as ambassadors of the Office of Lawyer Regulation, the legal profession and the public. They apply their local experience and knowledge of specific areas of legal practice and other professional and technical knowledge to the thorough and impartial investigation of grievances and provide an opportunity to lawyers for voluntary service to the profession. They apply judgment from public and professional perspectives in the evaluation of professional misconduct. They promote public confidence in the integrity of the Lawyer Regulation System, and consequently, in the administration of justice, by integrating peer review (which is accepted by members of the profession) and local perspective into the investigation of grievances, and by educating the public about the system. There is a strong belief that the system is more credible when grievants and respondents are actively involved in the process. Abolishing District Committees would eliminate a major source of statewide public participation in the Lawyer Regulation System. The Preliminary Review Committee is of the view that District Committee reports develop useful information, especially in complex cases.

There is a perception that lawyers investigating lawyers is unfair to the public. The Board, however, feels this perception is unfounded and, in any event, is outweighed by the benefits it has identified in this Report in support of the continuation of District Committees.

There are problems both with the timeliness and uniformity of District Committee investigations, both of which are addressed in this Report.

A major thrust of the Office of Lawyer Regulation for the past several years, especially since a significant increase in grievances began in January 2001 with the commencement of telephonic grievances, has been reduction in the average overall grievance process time. The single biggest problem with the function of District Committees appears to be the length of time from assignment of a grievance to a Committee to completion of an investigation and delivery of a written report to OLR.

SCR 22.04(3) requires completion within 90 days. However, according to the Director's December 5, 2003 Report (page 17), since August 1999, Committee investigations have taken an average of 190 days to complete.

Processing delays are attributable to a number of factors, including the type of grievances which fit the criteria for Committee referral, use of volunteers (rather than full-time staff), the learning curve of new Committee members, delays arising from a respondent exercising his or her right to substitute the assigned investigator(s), and the lack of any formal requirements for District Committee Chairpersons or assigned investigator(s) to report periodically to OLR on an investigation's status.

The Board's recommendations to address timeliness are as follows:

- The 90 days should commence when a matter is finally assigned and accepted (i.e., any right to substitute has expired or has been exercised).
- The Director should issue a proposed Master Schedule, including milestone dates for the assignment of the investigator, the investigative meeting, submission of the draft investigative report, the District Committee meeting, and delivery of the investigative report to OLR staff, with extensions granted only with the Director's approval.
- District Committee Chairpersons should be responsible for requesting approval from the Director, with notice to both grievant and respondent, to exceed the 90-day time limit, setting forth reasons as well as a date by which an investigative report will be completed.
- District Committees should meet frequently enough to complete their work in a timely fashion as required by SCR 21.06(4). The Board recommends that District Committees schedule meetings at least every two months.
- District Committee members should attend at least one training session within the first year of appointment, covering both procedural and substantive ethics rules.

- The Office of Lawyer Regulation should develop additional ongoing training sessions for District Committee members.

“Overdue” investigations, as well as information from District Chairpersons and staff investigators, indicate that there is a communication gap between OLR staff and some District Committees. Part of the problem appears to be that there are no formal requirements for District Committee investigators or Chairpersons to report periodically to OLR on investigation status. SCR 21.03(6)(k), SCR 21.06(2), SCR 22.04(3), SCR 22.04(5), and SCR 21.11(2) all make it clear that the Director is responsible for the conduct and completion of District Committee investigations.

When considering a possible investigation referral, the Director must choose between OLR staff and a District Committee. With a staff investigator, the Director has greater control since the investigator reports directly to the Director, who sets staff investigator priorities. With a District Committee, the Director does not have the same direct control. The Director has no influence over a committee member’s pay since all are volunteers, nor is there any influence over appointment and tenure.

The Director's Report for FY 2003 shows that there were 122 referrals to District Committees for formal investigations. This represents close to 30% of all matters referred for formal investigation. (The 33 referrals to District Committees in FY 2004 (as of March 5, 2004) are abnormally low because the Director’s emphasis has been on closing grievances. We understand referred matters will increase to a more normal level as older grievances are closed.)

The decision by the Director as to what investigations to refer is based on appropriate selection criteria. The District Committee Procedures Manual provides (page 9):

That a referral is indicated when:

- The credibility of the grievant, respondent, or other witnesses would be best evaluated by face to face questioning that can be done most effectively by a local investigator or through an investigative meeting.

- The perspective of attorneys with expertise in a particular area of law would be helpful.
- The perspective of local practitioners and law people, or knowledge of local customs would be helpful.
- The investigation requires extensive examination of local files and other evidence.
- The grievance involves issues relating to a frivolous action or an excessive fee.

Matters are referred to the district that encompasses the geographic area where the matter originated. There is also consideration given, not only to current OLR staff workload, but also to the current workload of a particular district and, to a lesser extent, the “track record” of the particular district in completing investigations.

After referral, other problems can occur. There are variances in procedures between District Committees; and, in some cases, investigations are not initially completed to the satisfaction of OLR staff and must be referred back for further consideration. These have been addressed by providing District Committees:

- Training sessions beginning in May, 2001
- An updated Procedures Manual published in August, 2003
- A standardized investigation report template published in August, 2003

It is expected that the training sessions, Manual and template will help improve investigative report thoroughness and uniformity.

II

REVIEW OF DISTRICT COMMITTEES

A. Structure of the District Committee System and Individual District Committees

The current system divides this State into 16 areas mirroring State Bar Districts. This was the system under which the Board of Attorneys Professional Responsibility operated when the President of the State Bar appointed District Committee members.

The system of State Bar Districts is mandated by SCR 10.05(2). It permits members of the Board of Governors of the State Bar to represent proportionately the lawyers of this State. It also takes into consideration the composition of the 10 Judicial Administrative Districts, geography, and multi-county bar associations. It must be reviewed before January 1, 2005. The ten Judicial Administrative Districts were established by Supreme Court Order effective August 1, 1978 and the makeup of each, except for five counties, remains the same today.

The division of the State into districts is advantageous for administering matters. It enables greater geographic proximity to witnesses and it facilitates recognition and understanding of local customs and standards. Currently, the sixteen State Bar districts are used. This has the effect that Milwaukee County (District 2) and Dane County (District 9) have the largest number of members. Each District has but one committee except that Milwaukee functions as two. There are no limits (minimum or maximum) or guidelines on the number of committee members. In practice, the number of committee members is controlled both by the number of names submitted by the committees and by the number of Supreme Court appointees.

SCR 21.06 provides that the number of members of each District Committee shall be in proportion to the geographic and population size of the district. To the extent feasible, one-third shall be “non-lawyers.” Members serve staggered three-year terms and may not serve for more than three consecutive terms. Reappointment is possible after a one-year hiatus. (At the request of the “public members” of the Board, we have used that term rather than the term “non-lawyer” throughout this Report.

A “public member” includes a citizen eligible to vote and not a member of the State Bar.)

By providing that the number of members be in proportion to district geographic and population size, the number of committees is fixed and the number of committee members in each district is adjusted “based on geographic and population size.” This interpretation leaves little room to compensate for a committee size that would be too small or too large for optimal performance. This interpretation also does not appear to allow an appropriate number of members based on the number of grievances filed, especially when taking prisoner grievances into account.

The term limits system maintains a good balance between the need for expertise and the benefit of a fresh perspective. For many, the first term is largely a learning experience. Reappointment after a one-year hiatus insures that committees always will have experienced members. It allows for the reappointment of persons who are assets to the system, yet allows for introduction of fresh ideas, perspectives and expertise.

The Supreme Court appoints Committee members. Currently, the Court requires two applicants for every vacancy. Unsuccessful applicants are not notified of their non-appointment. Currently, District Chairpersons are not formally consulted regarding appointments as to what is needed on their committee in the way of particular areas of expertise, geographic location and diversity.

To the extent practical, the Board endorses the current appointment process. District Committees and, in particular, Chairpersons must take a more active role in recruiting members, both from the profession and the public. It is through this role that Chairpersons have input as to what skills are needed on their committees. In recruiting, Chairpersons must be cautioned not to make any promises to applicants about appointment. There must be greater communication with all applicants before and after appointments are made.

The Board recognizes its duty in encouraging local bar associations and community organizations to become proactive in identifying potential members for District Committees. Towards this end, the Board should compile a list of resources that can be used in the appointment process, keeping in mind that diversity in all areas is important.

SCR 21.06(1) states that “to the extent feasible, one third of the members shall be nonlawyers.” The Board recommends that SCR 21.06 be amended to mandate, as a goal, that up to two-fifths of all members of District Committees be public members. An increase from one-third to two-fifths would help blunt the perception that lawyers investigating lawyers is unfair. Public members should be actively recruited and promptly appointed so they do not lose interest. Public members are not expected to be familiar with the ethics rules or to be expert investigators. They perform a significant role by applying their common sense, judgment and experience to a Committee’s consideration of grievances. The Board recognizes that public members need to have certain minimum qualifications. They would have to take a more active role in investigations than they do now, but, with appropriate training, this should be attainable.

We are not aware of a single instance in which committee votes have been split on the basis of public members versus lawyer members. There are no predetermined professional qualifications for public membership. Like jurors, public members are called upon to observe, to evaluate and to vote. Unlike jurors, public members fully participate in both fact-finding and deliberations. Public members help assure the fairness of the deliberations, both by participating and by witnessing, and thereby helping establish regulatory system credibility. No public members are either Chairpersons or Vice-Chairpersons.

Whether there are one-third or two-fifths public members, in either case, they will be in the minority. A simple majority is needed for a meeting quorum. Committee decisions are made by majority vote. Public members are not required either for a quorum or a majority vote.

District Committee membership for FY 2003 is shown in the following table.

District	Members	Lawyer	Public	% Public
1	13	10	3	23%
2	36	28	8	22%
3	12	8	4	33%
4	10	7	3	30%
5	16	11	5	31%
6	13	8	5	38%
7	10	7	3	30%

8	14	10	4	29%
9	30	20	10	33%
10	4	3	1	25%
11	14	12	2	14%
12	21	13	8	38%
13	8	5	3	38%
14	13	9	4	31%
15	15	11	4	27%
16	13	9	4	31%
<i>Total</i>	242	171	71	
<i>Average</i>	15.13	10.69	4.44	30%

Report of the Lawyer Regulation System, FY 2002 - 2003,
Keith L. Sellen, William H. Levit, Jr.

This table shows that the sixteen District Committees vary in size from four members in District 10 to 36 members in District 2. Public members average 30% of total members.

Keeping in mind the timeliness problem raised in this Report and the public perception of intrinsic unfairness when lawyers regulate lawyers, the Board has appointed a subcommittee comprised of all four of its public members, as well as one lawyer member, to continue to monitor the operation of District Committees. This subcommittee will report any recommendations back to the Board before its March, 2005 meeting.

District Committees function under the supervision of the Director. Close supervision by the Director is essential to assure that investigations proceed uniformly and in a timely fashion so as to insure fairness to both grievants and respondents.

B. Role of District Committees

Committee duties are set forth in SCR 21.06(3):

- (a) To educate the bar and the public about the high ideals of the legal profession and the practice of law consistent with the rules of professional conduct. . . .
- (b) To refer promptly to the director any possible misconduct or medical incapacity of an attorney that comes to its attention.

- (c) To assist in the investigation of possible misconduct or medical incapacity of an attorney upon referral by the director.
- (d) To make a recommendation to the director as it may consider appropriate as to the disposition of any matter the committee has investigated.
- (e) To assist upon request of the director in monitoring an attorney's participation in an alternatives to discipline program or compliance with conditions imposed on the attorney's practice of law.
- (f) To resolve or adjust at the request of the director a dispute between an attorney and a client or other attorney if the dispute does not involve misconduct or medical incapacity and the complaining person agrees to the procedure. * * *

These duties should not be modified. They are flexible enough to allow the Director to utilize District Committees effectively. Prior to current changes in the system, District Committees handled reinstatement hearings. Referees now handle them. This seems to be working well.

C. District Committee Operating Procedures

All sixteen District Committees operate with different procedures. The rationale given for this is that the practice of law varies throughout this State. There are guidelines for operating procedures. District Committees operate at little or no cost to the Office of Lawyer Regulation because committee members are volunteers. Due to the voluntary nature of committees, as well as other factors, reports frequently are not completed within the 90-day period mandated by SCR 22.04(3).

The Policy Manual anticipates that referral of a grievance to a District Committee proceed as follows:

A grievance would be referred to the Chairpersons, who would appoint a member or committee of members to investigate. That member would be the lead investigator and interview all parties and witnesses. That member would determine if an investigative meeting was necessary. If so, it would be held before the District Committee or a subcommittee. The meeting

would not be on the record. Both parties would be invited and subjected to questioning by committee members. Cross-examination would not be encouraged. After the meeting, a Report would be drafted by the lead investigator and disseminated to the entire District Committee prior to a subsequent meeting noticed to discuss it. (The committee could discuss the matter and come to some conclusions before the assigned member drafts a report although this is not the recommended practice.) At some point, there must be a meeting of the District Committee to consider the report and decide whether the investigation is complete; whether there is clear, satisfactory, and convincing evidence to support each allegation of misconduct; and whether to submit a recommended disposition. After this meeting, the report must be finalized to reflect the District Committee's decision and then filed with Office of Lawyer Regulation. This whole process must be completed within 90 days.

It is recommended that all District Committees implement this procedure. The Board recognizes that there are types of grievances that are better handled without investigative meetings. This should be the exception rather than the rule. The formality of an investigative meeting demonstrates that the system takes grievances seriously. It is desirable that parties confront each other to accomplish that purpose. The concept of the "parties receiving their day in court" has substantial value to the fairness and effectiveness of the system. This procedure also serves an educational function for participants. It is not just "form over substance." It is important that procedurally lawyers are treated uniformly throughout the State.

Cross-examination of the parties by each other at investigative meetings should not be permitted. It is time-consuming and can be intimidating and overwhelming for a grievant. However, Committees should develop procedures to allow parties to submit proposed areas of inquiry to the Chairpersons, who would exercise discretion in allowing them to be explored.

Currently, there are no verbatim transcripts of investigative meetings. This should continue except in exceptional circumstances.

It is recommended that the 90-day mandate neither be extended nor changed to an aspirational goal. Lawyers operate better and naturally under deadlines. It is important to the parties that grievances be resolved as expeditiously as possible.

The Board recommends retaining the 90-day standard and implementing the measures recommended in this Report to achieve it. At no time during the past ten years has the 90-day standard been achieved for the system as a whole. In the mid 1990's, when overall caseload was at its lowest, the best result (114 days on average) was achieved. Presently a few committees are meeting the standard yet the percentage of cases completed within 90 days remains low.

The Board is mindful that, during the past three years, District Committees were assigned a higher number of cases as a means to help reduce the caseload, and caseload correlates directly to timeliness. As a result, the Board believes that once the current backload is reduced to acceptable levels, and, with the implementation of additional measures proposed later in this Report, District Committees may be better able to meet the 90-day standard.

Considering the fact that District Committee investigations involve a portion rather than the entire processing of a grievance, it is important to maintain a prompt processing standard and to work diligently toward meeting it. There is a need for a better relationship between OLR staff and Committees. This is improving as the system works down the backlog and as the training of Committee members improves.

As noted above at pages 2 and 3, commencement of the 90 days should be changed from the time a Committee Chairperson receives a grievance to the time that a case is finally assigned and accepted. Currently, the time limit can be as short as 76 days because a respondent has a right to substitute within 14 days of notification of assignment of the lead investigator. The 90-day mandate assumes that the Chairperson assigns a matter as soon as it is received and that the lead investigator immediately sees no problems and accepts it. Changing the date of commencement of the 90-day period should resolve both these concerns.

It is essential that District Committee meetings be held as appropriate in order to meet the 90-day time limit. SCR 21.06(4) states, "Each district

committee shall hold regularly scheduled meetings as needed to complete its work timely. Meetings also may be held at the call of the chairperson.”

Currently, most District Committees meet quarterly. Meetings are scheduled in advance for an entire year. It is problematic for Committees to hold special meetings to comply with the 90-day time limit. Scheduling meetings at least every two months should alleviate this concern according to what the Board has learned from District Chairpersons.

Before the Director assigns an investigation to a District Committee Chairperson, it is recommended that the Director issue a proposed Master Schedule. This schedule would include milestone dates for the assignment including assigning the lead investigator, holding the investigative meeting, submission of the draft investigative report, the District Committee meeting, and completion of the investigative report. The schedule would help enforce the 90-day standard. The Director and the Chairperson would agree on the schedule. The Chairperson would be responsible for meeting the dates. Extensions would be granted only if approved by the Director. If the Director does not approve schedule changes, the Committee’s work will be immediately concluded and sent by the Chairperson to the Director. The Director would subsequently assign the investigation to OLR staff or another District Committee as appropriate.

As a part of the proposed Master Schedule, a response from the Office of Lawyer Regulation would be made to the Committee’s draft investigative report in a timely manner so that any concerns, especially as to completeness, could be communicated to the Chairperson prior to the District Committee meeting.

There also should be a requirement that the Chairperson is responsible for requesting approval from the Director to exceed the 90-day time limit setting forth reasons as well as a target date by which the report is to be filed. This would allow for cases that require more than 90 days to resolve. Requests for extensions should be on notice to both parties.

Currently, Committees investigate lawyers in their own districts. It is an advantage for local lawyers to investigate each other because they are familiar with local community standards and practice nuances. At

present, Chairpersons try to assign cases to lawyers who have expertise in the subject matter of the grievance. It is an advantage for lawyers to investigate lawyers who have similar practices.

D. Training of District Committee Members

Since the inception of the Office of Lawyer Regulation, there have been four training sessions offered by the Director each year. Training has been held throughout the State. The sessions are interactive, but introductory in nature. Attendance is not required for appointment to District Committees.

Each member should be required to attend at least one training session during the first year of appointment as a condition of appointment. The viewing of a training video could fulfill this requirement, but this method should be discouraged. Training should consist of procedural as well as substantive ethics rules. There is no need for additional mandatory training because initial training is reinforced by actual Committee work. However, there is a need to develop additional ongoing training for those members who wish to participate in it.

III

MEASUREMENT OF PUBLIC TRUST AND CONFIDENCE

In 2002 the Board of Administrative Oversight began surveying all users of the Lawyer Regulation System. The Board separately monitors responses from users of District Committees.

As noted above, a disadvantage of the District Committee structure is that the public apparently perceives that it, as well as the entire Lawyer Regulation System, is inherently unfair because lawyers investigate other lawyers. However, the Board could find no evidence to support this perception. We recognize that there should be greater active participation of public members in District Committees. This should help alleviate what we believe is a misperception. The Board also favors the referral of more grievances to District Committees. This has the advantage of

putting a public face on the system, which should help increase public trust.

As stated above, the Board of Administrative Oversight proposes that it further study the composition of District Committees as well as their operation. This will be undertaken by a subcommittee comprised of all four public members of the Board as well as at least one lawyer member. It will study the apparent perception of inherent systemic unfairness and explore ways for the Board to help alleviate it.

IV

RECOMMENDATIONS

The Board recommends:

1. That District Committees be retained.
2. That the present sixteen-District system be retained.
3. That the current system of staggered three-year terms with no more than three consecutive terms and with reappointment possible after a one-year hiatus be continued.
4. That the Supreme Court continue its current process for appointing District Committee members.
5. That references in the Rules to “non-lawyers” be changed to “public members.”
6. That the Board of Administrative Oversight compile a list of community resources for potential public members that can be used in the appointment process keeping in mind that diversity in all areas is important.
7. That SCR 21.06 be amended to mandate as a goal that up to two-fifths of all District Committee members be public members.
8. That District Committees continue to function under the supervision of the Director.

9. That the duties of District Committees listed in SCR 21.06(3) should not be modified.
10. That the procedure called for in the Policy Manual be implemented by all District Committees and that they be encouraged to conduct investigative meetings.
11. That cross-examination of the parties by each other at investigative meetings not be permitted, but that Committees develop procedures to allow parties to submit proposed areas of inquiry to the Chairperson, who would exercise discretion in allowing them to be explored.
12. That there continue to be no verbatim transcripts prepared of investigative meetings except in exceptional circumstances.
13. That the 90-day mandate of SCR 22.04(3) neither be extended nor changed to a goal and that the commencement of the 90 days should be changed from the time a Chairperson receives a grievance to when a matter is finally assigned and accepted.
14. That District Committee Chairpersons be responsible for requesting approval from the Director, with notice to both parties, to exceed the 90-day time limit setting forth reasons as well as a date by which a Report will be filed.
15. That District Committees schedule meetings at least every two months.
16. That the Director and District Committee Chairpersons agree on a Master Schedule at the time an investigation is referred to a committee.
17. That Committee members be required to attend at least one OLR training session within the first year of appointment as a condition of appointment, such training to cover both procedural and substantive ethics rules.

18. That the Office of Lawyer Regulation develop and offer additional training sessions for District Committee members.
19. That the Office of Lawyer Regulation refer as many grievances as feasible to District Committees.

Dated this 22nd day of March, 2004.

Respectfully Submitted,

The Board of Administrative Oversight
of the Lawyer Regulation System

/s/
By _____
William H. Levit, Jr., Chair

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